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No. 90-1080

In The

Supreme Court of the United States

October Term, 1990

FRANCIS J. BRADAC AND ELIZABETH M. BRADAC,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITIONERS' REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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INTRODUCTION

Respondent has failed to rebut effectively the grounds set forth by Petitioners as to why this Honorable Court should grant *certiorari* in this case. Respondent's Brief In Opposition either ignores those grounds with the hope that they will go away, or seeks to obscure them with the hope that they will be overlooked.

However, those grounds will not go away and they will not be overlooked. They provide ample and abundant authority for this Honorable Court to grant *certiorari*.

ARGUMENT

A. The Decision Below Is An Important And Recurring Issue That Demands Resolution By This Honorable Court.

Respondent ignores the argument advanced by Petitioners as to the national significance of the issue presented by this matter – a significance that provides ample and abundant authority for the granting of *certiorari*. Respondent apparently hopes that the overriding importance of this issue will go away. Unfortunately for thousands of Americans, it will not go away.

In the 1991 budget passed by Congress on October 27, 1990, four federal agencies were given $301.1 million to buy and to condemn privately-owned lands during 1991.[1] The 1991 budget represents a dramatic increase for each of those four agencies.[2] These land acquisition funds will be expended in 43 states and the District of

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[1] The agencies are the National Park Service, the U.S. Fish and Wildlife Service, the U.S. Forest Service, and the Bureau of Land Management.

[2] The increase over the 1990 budget represented by the 1991 budget for each of the four agencies is as follows:

National Park Service: 53.6%
U.S. Fish and Wildlife Service: 36.7%
U.S. Forest Service: 40.5%
Bureau of Land Management: 24.6%

Columbia. This aggressive approach to land acquisition is likely to continue into the future. President Bush's Fiscal Year 1992 budget proposes the largest land acquisition budget in the history of the U.S. Forest Service and the Bureau of Land Management.[3]

Petitioners respectfully maintain that the staggering size of the federal budget for land acquisition and the increasing number of programs which provide for such acquisitions underscore and dramatize the importance of this issue. Increasing numbers of Americans will become involved in "negotiations" with the U.S. Government over the "value" of their property. When those negotiations break down, condemnation and litigation over the value of their property will be the result. When landowners prevail over the U.S. Government – not in regaining their land but in receiving proper payment for that land – the payment received should not be diminished by the fees incurred by the landowner to protect his or her interests against the U.S. Government. That is the state of the law. Under the Equal Access to Justice Act,[4] when the position taken by the U.S. Government is not "substantially justified," the U.S. Government must pay for attorney and expert fees.

It is respectfully submitted that sound public policy requires the adoption by this Honorable Court of a

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[3] The Bureau of Land Management land acquisition budget is proposed to increase to $47.5 million – a startling 204% jump from even 1991's dramatic increase. The U.S. Forest Service land acquisition budget is proposed to increase to $123.1 million – a 38% increase from 1991's rise.

[4] 28 U.S.C. § 2412(d)(1)(A)

uniform standard to be applied by the circuits in determining what constitutes "substantial justification" in land acquisition "negotiations" and subsequent condemnation proceedings. Yet while sound public policy may merit action, it is the voices of thousands of Americans which cry out for such action. For this is not simply about the ability to be compensated justly for the loss of one of our nation's most treasured liberties – the right to own property – it is about fundamental fairness.

B. A True, Direct, Intolerable and Irreconcilable Conflict Exists Between The Decision Below And The Decision Rendered By This Honorable Court.

Respondent attempts to dismiss, in a footnote, the clear conflict between a decision of this Honorable Court, *Pierce v. Underwood*, 487 U.S. 552 (1988), and the decision below. This Honorable Court has held that one need not show frivolousness in order to demonstrate that the position of the U.S. Government was not "substantially justified." The question now posed is whether "bad faith" is the same as "frivolousness" in determining whether the U.S. Government's position was "substantially justified." Petitioners respectfully submit that the two are fundamentally the same and an applicant for funds under the Equal Access to Justice Act need not demonstrate "bad faith" anymore than such an applicant would need to demonstrate "frivolousness" to receive an award.

Unfortunately, in this instant case we will not know whether the use by the Seventh Circuit of some touchstone besides "bad faith" would have resulted in a decision for the Petitioners. The Seventh Circuit, having

found that "there has been no showing of bad faith on behalf of the government" (App. at 8.), simply rejected the Bradacs' plea without further inquiry. In light of this clear disregard for the holding of *Pierce v. Underwood*, and the strong dissent of Senior Circuit Judge Pell, the petition should be granted or summary reversal ordered.

C. A True, Direct, Intolerable And Irreconcilable Conflict Exists Between the Decision Below And The Decision Of The Eighth Circuit Court Of Appeals Upon Which That Decision Is Based.

Respondent attempts to obscure the fact that the Seventh Circuit ruled for the U.S. Government despite the failure of the U.S. Government to adhere to the rule set forth by the Eighth Circuit upon which the Seventh Circuit allegedly relied.[5] In the instant case, the Seventh Circuit acknowledged that the U.S. Government had failed to "use actual comparable parcels." (App. at 8.) "[W]e are puzzled that the Government's appraisal did not use actual comparable parcels from the St. Croix area. . . . " *Id.* The District Court found that the U.S. Government "used comparables containing both wooded areas and waterfront property, but did not use comparables from the St. Croix River." (App. at 20.)

Again, Respondent seeks to obscure the fact that the Seventh Circuit found that the U.S. Government had used

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[5] Respondent's scurrilous accusation that Petitioners misstated the opinion of the Court of Appeals will be ignored. As the text above makes clear, Petitioners have quoted and stated accurately.

"comparables" but not "actual comparables." Thus, the Seventh Circuit, while embracing a rule which compels the use of "actual comparables," concluded that the use of "comparables" was enough. That is not the rule set forth by the Eighth Circuit in *United States v. 1,378.65 Acres (Vernon County)*, 794 F.2d 1313 (8th Cir. 1986).[6]

D. A True, Direct, Intolerable And Irreconcilable Conflict Exists Between The Decision Below And Decisions Rendered By Other Courts of Appeal.

Respondent attempts to obscure the fact that the circuits have adopted different and conflicting standards as to what constitutes "substantial justification." With reference to the "totality of the circumstances" standard, Respondent argues that "[p]etitioners do not explain how standards of such breadth are undermined by the court of appeals' decision here." (Brief in Opp. at 9.)

However, a careful review of *United States v. Charles Gyurman Land & Cattle Co., et al.*, 836 F.2d 480 (10th Cir. 1987), reveals a detailed discussion of the varying factors considered by the circuits in making "substantial justification" determinations. *Id.* at 483-84. In fact, the Seventh Circuit acknowledged this conflict among the circuits, concluding that the circuits have "utiliz[ed] somewhat varied approaches and at times achiev[ed] different results." (App. at 6.) It is clear that, for the Tenth Circuit

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[6] Respondent's argument (Brief in Opp. at 9, n. 4) that the holding of the Eighth Circuit in *Vernon County* did not require the use of actual comparables is disingenuous at best.

at least, the hiring by the U.S. Government of an "experienced, qualified, and competent appraiser" – the rule set forth by the Eight Circuit – is not enough. This conflict between circuits compels resolution by this Honorable Court.

Respondent also attempts, in a footnote (Brief in Opp. at 10, n. 6.) to obscure Petitioners' argument that the Seventh Circuit is in conflict with other circuits by its failure to determine whether the government's expert was "neutral and impartial." Respondent is correct that *Vernon County* did not require this separate inquiry. However, Respondent is in error in its assertion – without authority – that a finding that the U.S. Government's expert was "qualified and competent" thereby would "put to rest any suggestion that his objectivity was in doubt." (Brief in Opp. at 10, n. 6.) The fact that an individual is "qualified and competent" does not mean *a priori* that same individual is "neutral and impartial." Respondent's assertion to the contrary must fail.

Respondent is further in error for its failure to recognize that the requirement for a "neutral and impartial expert" was established by the Eleventh Circuit in *United States v. 640 Acres (Dade County)*, 756 F.2d 842 (11th Cir. 1985). In fact, the Eleventh Circuit made it clear that, in determining whether the position of the U.S. Government was "substantially justified," it demands "a neutral and impartial expert" not "one regularly employed by the government." *Id.* at 850. What is obvious from this discussion which Respondent seeks to obscure is that there exists a true, direct, intolerable and irreconcilable conflict among the circuits which compels resolution by this Honorable Court.

CONCLUSION

For the foregoing reasons, as well as those contained in the Petition, a *writ* of *certiorari* should be granted.

Respectfully submitted,

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